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No. 05-9222

IN THE

Supreme Court of the United States

LONNIE L. BURTON,
Petitioner,

v.

DOUG WADDINGTON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF INDIANA, ARIZONA, ARKANSAS, COLORADO, FLORIDA, HAWAII, ILLINOIS, MICHIGAN, MONTANA, NEVADA, OHIO, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, VIRGINIA, VERMONT, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Is the holding in *Blakely v. Washington* a new rule or is it dictated by *Apprendi v. New Jersey*?

2. If *Blakely* is a new rule, does its requirement that facts resulting in an enhanced statutory maximum be proved beyond a reasonable doubt apply retroactively?

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INTEREST OF AMICI CURIAE

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court ruled that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. In *Blakely v. Washington*, 542 U.S. 296 (2004), the Court ruled that the "statutory maximum" sentence for *Apprendi* purposes is the maximum sentence that can be imposed solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. The question here is whether this rule from *Blakely* is retroactively applicable to cases on federal collateral review. The *amici* States have a substantial interest in the answer to this question.

The presumption that new rules of criminal procedure do not apply on federal habeas review protects the States's compelling interest in the finality of criminal convictions. *See Beard v. Banks* (*Banks II*), 542 U.S. 406, 412-13 (2004). Otherwise, "the application of new rules to cases on collateral review ... [would] continually force[] the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." *Teague v. Lane*, 489 U.S. 288, 310 (1989) (opinion of O'Connor, J.).

If *Blakely* is applied retroactively, the *amici* States will see immediate and far-reaching effects on their criminal justice systems. Retroactivity would potentially open a staggering and immeasurable number of sentences to collateral attack in both state and federal courts. Relitigating these presumptively valid and long-final sentences on collateral review would require the *amici* States to undertake a massive realignment of resources and priorities of their judicial, prosecutorial, public defender, and correctional agencies. For these reasons and those explained below, the

amici States urge the Court to affirm the judgment of the court of appeals.

SUMMARY OF THE ARGUMENT

Blakely v. Washington, 542 U.S. 296 (2004), announced a new rule of criminal procedure that is not retroactively applicable on collateral review pursuant to *Teague v. Lane*, 489 U.S. 288 (1989). While dicta in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), may have supported the rule eventually announced in *Blakely*, it did not dictate *Blakely*'s outcome. Indeed, at the time of the state court decision at issue here, only one state court had read *Apprendi* as expansively as the Court eventually did in *Blakely*. Moreover, every circuit had held that the term "statutory maximum" meant the maximum sentence allowed under the relevant statute and not, as *Blakely* later clarified, the maximum sentence that could be imposed without any additional factual findings. Even a near-majority of this Court believed that *Apprendi* did not command the *Blakely* rule. Given that landscape, it cannot be said that the *Blakely* rule was an "old rule" for retroactivity purposes.

Nor did *Blakely* establish a watershed rule. First, *Blakely* does not seriously diminish the likelihood of reaching an accurate sentence, as illustrated by the Court's recent holdings that *Apprendi* and *Blakely* errors are subject to procedural default and harmless error analysis. Errors that do not warrant automatic reversal simply do not "seriously diminish" the truth-finding function of a jury trial. Second, *Blakely* does not alter our understanding of a fair trial. Unlike *Gideon v. Wainwright*, 372 U.S. 335 (1963), the *Blakely* rule did not establish a new right that changes our view of fairness. Rather, it marks the latest installment in a lengthy and graduated development of this area of constitutional law.

Nothing in this new rule is so groundbreaking as to be properly characterized as watershed.

Finally, Burton is not entitled to habeas relief because *Blakely* was not "clearly established" law at the time the Washington courts addressed his claim. The Court has made clear that the *Teague* analysis is distinct from the statutory standard for habeas relief found in 28 U.S.C. § 2254(d)(1). When the state courts adjudicated this claim, nothing in the Court's "holdings, as opposed to the dicta," *see Williams v. Taylor*, 529 U.S. 362, 412 (2000), clearly established the rule Burton now invokes. Habeas corpus relief is therefore unavailable here regardless of whether *Blakely* is retroactive.

ARGUMENT

I. *Blakely* announced a new rule of criminal procedure

As a general matter, "new rules will not be applied or announced in cases on collateral review unless they fall into one of [the] two exceptions" set forth in *Teague v. Lane*, 489 U.S. 288 (1989). *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989), *overruled on other grounds, Atkins v. Virginia*, 536 U.S. 304 (2003). *Blakely* announced a *Teague*-barred new rule by giving a definition to the term "statutory maximum" that was not dictated by precedent. Prior to *Blakely*, lower courts acting reasonably and in good faith could have understood "statutory maximum" in a way that permitted judges to decide factors permitting certain sentence enhancements. Such decisions should not be subject to collateral attack.

1. Generally, a rule is new if "it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301 (opinion of

O'Connor, J.)[1]. "[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.* Here, Burton relies principally on the Court's statement in *Blakely* that "[o]ur precedents make clear ... that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 542 U.S. at 303. The Court's view that a particular question is answered by prior cases, however, does not mean its decision merely applies an old rule. *Butler v. McKellar*, 494 U.S. 407, 415 (1990).

To be sure, it can often be difficult "to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law." *Penry*, 492 U.S. at 314 (*quoting Mackey v. United States*, 401 U.S. 667, 695 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)). *See also Butler*, 494 U.S. at 412-13 ("In the vast majority of cases, however, where the new decision is reached by an extension of the reasoning of previous cases, the inquiry will be more difficult."). Such difficulties are resolved by reference to the underlying purposes of federal habeas corpus review. *Saffle v. Parks*, 494 U.S. 484, 488 (1990) (*citing Butler*, 494 U.S. at 412-14). "Foremost among these is ensuring that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of the proceedings." *Id. Teague*'s new-rule principle "therefore validates reasonable, good faith interpretations of existing precedents made by state courts even though they are later shown to be contrary to later decisions." *Id.*

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[1] All further citations to *Teague* are to Justice O'Connor's plurality opinion.

In other words, *Teague* protects reasonable, good-faith interpretations of the Court's precedents by the lower courts, even if those courts are later found to have been wrong. *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997). Thus, a rule is effectively "new" unless lower courts on direct review acted "objectively unreasonably by not extending the relief later sought" on collateral review. *Id.*

2. *Apprendi v. New Jersey*, 530 U.S. 466 (2000), ruled that criminal defendants are entitled to have a jury decide facts (other than prior convictions) that could lead to a sentence "beyond the statutory maximum." *Apprendi*, 530 U.S. at 483. In that case, a defendant pleaded guilty to a second-degree firearm offense, but the trial court found that the crime was motivated by racial bias and applied a hate-crime sentencing enhancement. *Id.* at 470-71. As a result, the defendant received a sentence higher than what was otherwise statutorily allowed for his level of offense. In passing, the Court happened to suggest that this rule would apply to facts that, if true, would lead to a sentence exceeding "the maximum [the defendant] would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 483.

Lower courts in 2001 understood *Apprendi* to mean that "statutory maximum" was the maximum sentence allowed under the relevant statute and not, as *Blakely v. Washington*, 542 U.S. 296 (2004), later clarified, the maximum sentence that could be imposed on the basis of the jury's verdict alone, *i.e.*, without additional factual findings. 542 U.S. at 303. As observed by the *Blakely* dissenters, all 12 circuits and at least four states had rejected the application of *Apprendi* to guideline sentencing schemes. *Id.* at 320 n. 1 (O'Connor, J., dissenting) (compiling cases). Prior to *Blakely*, only the Kansas Supreme Court had concluded that *Apprendi* applies

to sentences within the maximum statutory range for a particular offense. *State v. Gould*, 23 P.3d 801 (Kan. 2001).

With this background in mind, it is important to remember that *Teague*'s definition of a new rule includes a "rule that replaces palpable uncertainty as to what the rule might be." *Penry*, 492 U.S. at 352 (Scalia, J., concurring in part and dissenting in part). Not until *Blakely* was it obvious that a statement not essential to the *Apprendi* holding was so critically important. *See also Washington v. Recuenco*, 126 S. Ct. 2546, 2549 (2006) (*Blakely* "clarified" the meaning of "statutory maximum"). The "simple and logical difference" between the "precise holding" of *Apprendi* and the later meaning given to "statutory maximum" in *Blakely* qualifies the *Blakely* rule as a new one. *Saffle*, 510 U.S. at 490.

Moreover, the 5-4 margin and range of opinions expressed in *Blakely* further demonstrate that the lower-court debate over "statutory maximum" was reasonable. *O'Dell*, 521 U.S. at 159-60. *See also Beard v. Banks* (*Banks II*), 542 U.S. 406, 415-16 (2004). Although the answer in *Blakely* may have been "clear" to a majority of this Court, *Apprendi* was "susceptible to debate among reasonable minds" and "[i]t would not have been illogical or even a grudging application" of *Apprendi* "to decide that it did not extend" to *Blakely*. *Butler*, 494 U.S. at 415. Because the unlawfulness of Blakely's sentence was not "apparent to all reasonable jurists," *Blakely* announced a new rule of criminal procedure. *Banks II*, 542 U.S. at 413 (*quoting Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997)).

3. *Blakely* is not the first case to announce a rule that is not retroactive despite being compelled by prior cases. In *Arizona v. Roberson*, 486 U.S. 675 (1988), the Court held that the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation. 486 U.S. at 682. The Court found its

decision to be compelled by *Edwards v. Arizona*, 451 U.S. 477 (1981), which held that police must refrain from further questioning during continuous custody once the suspect invokes his right to counsel on any offense. *Roberson*, 486 U.S. at 677-78. The Court later ruled that *Roberson* announced a new rule, *Butler*, 494 U.S. at 415, and in so doing acknowledged that it frequently views cases as being "controlled" or "governed" by prior cases "even when aware of reasonable contrary conclusions reached by other courts." *Id.* Additionally, many state courts, as well as the Fourth and Seventh Circuits, had disagreed over whether *Edwards* required police to refrain from questioning a defendant about a crime where the defendant has retained counsel on another charge. *Id.* at 410-11, 415 & n.3. Accordingly, *Teague* required the *Roberson* decision to be classified as a "new rule" for retroactivity purposes. *Id.* at 415.

The Court also refused to apply retroactively *Bullington v. Missouri*, 451 U.S. 430 (1981), which held that the Double Jeopardy Clause barred a second capital sentencing proceeding after the first jury had refused to impose the death penalty. The decision not to apply *Bullington* retroactively turned in large part on disagreements among lower courts about *Bullington*'s application to non-capital sentencing proceedings. *Caspari v. Bohlen*, 510 U.S. 383, 393-95 (1994) (observing that the Tenth Circuit, Indiana Supreme Court, New York Court of Appeals, and Missouri Court of Appeals had all held that the *Bullington* did not apply beyond capital sentencing while the Fifth Circuit, Washington Supreme Court, and Texas Court of Criminal Appeals had held to the contrary). *Id.* at 393-94.

Here, by comparison, the *Blakely* definition of "statutory maximum" was not dictated by *Apprendi*, every circuit had so held, and *Blakely* itself carried only a bare majority of the Court. It follows that lower court rulings contrary to *Blakely* were reasonable, that *Blakely* therefore announced a new rule

for *Teague* purposes, and that *Blakely* can be applied retroactively only if it announced a watershed rule of criminal procedure.[2]

II. *Blakely* is not a watershed rule

Under *Teague*, a new rule may apply retroactively on collateral review if it is a "watershed rule" that implicates the fundamental fairness and accuracy of the criminal proceeding. To be a "watershed rule," the new rule "must meet two requirements: [i]nfringement of the rule must 'seriously diminish the likelihood of obtaining an accurate conviction,' and the rule must 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding. *Tyler v. Cain*, 533 U.S. 656, 665 (2001) (*quoting Sawyer v. Smith*, 497 U.S. 227, 242 (1990), and *Teague*, 489 U.S. at 311). *Blakely* does not seriously enhance the likelihood of accurately sentencing a defendant and is not one of the "small core of rules," *Graham v. Collins*, 506 U.S. 461, 478 (1993), that mark a "groundbreaking occurrence," *Caspari*, 510 U.S. at 396, in our understanding of a fair trial. As such, *Blakely* is not a watershed, retroactive rule

A. *Blakely* error does not seriously diminish accuracy

1. Last term, the Court held that *Blakely* error is not "structural" and can be harmless. *Recuenco*, 126 S. Ct. at 2553. If an error does not "necessarily render a criminal trial fundamentally unfair or an *unreliable* vehicle for determining

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[2] Burton does not argue that *Blakely* is a substantive rule, the first exception to the *Teague* non-retroactivity doctrine. Nor can he. *See Schriro v. Summerlin*, 542 U.S. 348, 353-55 (2004) (holding that *Ring v. Arizona*, 536 U.S. 584 (2002), which applied *Apprendi* to capital cases, did not establish a substantive rule).

guilt or innocence," *id.* at 2551 (*quoting Neder v. United States*, 527 U.S. 1, 9 (1999)) (emphasis added), it is difficult to say that it nonetheless "seriously diminish[es] the likelihood of obtaining an *accurate* conviction." *Teague*, 489 U.S. at 311 (emphasis added). "Accuracy" and "reliability" are obviously closely related—if not identical—concepts.

Blakely's new rule, the definition of a "statutory maximum" sentence, in no way implicates those concerns. Indeed, any definition that the Court could have settled upon would not have enhanced or effected in any way the *accuracy* of sentencing proceedings. Burton ignores this and instead focuses his analysis on the *Blakely* Court's reaffirmation of the *Apprendi* rule. But *Neder* and *Recuenco* illustrate how that rule does not significantly enhance accuracy, either.

In *Neder*, the Court held that the failure to submit an element of an offense to the jury for proof beyond a reasonable doubt is not a structural error. 527 U.S. at 9. In *Recuenco*, the prosecution failed to submit the fact that the defendant was armed with a firearm, a fact that increased the range of available sentences. 126 S. Ct. at 2549. The "only difference" between the error in *Neder* and the error in *Recuenco* is that in *Neder* the prosecution failed to prove an *element of the offense* to the jury beyond a reasonable doubt while in *Recuenco* the prosecution failed to prove a *sentencing factor* to the jury beyond a reasonable doubt. *Id.* at 2552. That distinction lacks any constitutional significance. *Id.* If, despite constitutional error, a trial is sufficiently reliable to determine guilt, it follows that the error cannot have "seriously diminish[ed]" the accuracy of the conviction or sentence.

2. Similarly, it is also significant that *Apprendi* errors in federal criminal prosecutions are subject to the plain error rule. *United States v. Cotton*, 535 U.S. 625, 632-33 (2002). The Court ruled in *Cotton* that the failure to prove a drug

quantity leading to an enhanced sentence did not seriously affect the "fairness, integrity, and public reputation of judicial proceedings." *Id.* Rather, the Court said that the real danger to the "fairness, integrity, and public reputation of judicial proceedings" would be to reduce a defendant's sentence despite overwhelming and uncontroverted evidence of his involvement in a vast drug conspiracy. *Id.* at 634. Such treatment further undermines the argument that *Blakely* seriously enhances the accuracy of sentences. If these errors did in fact "seriously diminish the likelihood of obtaining an accurate conviction," certainly the errors would have been deemed by the Court to be sufficiently "plain" to warrant reversal.

3. It would be illogical to excuse the errors in *Neder*, *Recuenco*, and *Cotton* through procedural default and harmless error analysis, yet reopen potentially hundreds of thousands of conclusively final state and federal convictions based on nothing more serious. This is not to say that the burden of proof requirement lacks any effect on the accuracy of convictions and enhanced sentences. But a watershed rule must *seriously diminish* accuracy. It is difficult to see how the accuracy of decades worth of presumptively valid state and federal sentences were seriously diminished in the absence of the new *Apprendi* and *Blakely* rules.

B. *Blakely* does not alter our understanding of a fair trial

1. Aside from whether the reasonable doubt standard seriously enhances accuracy, *Blakely* did not "alter our understanding of the bedrock procedural elements necessary for a fair trial." *Tyler*, 533 U.S. at 665 (internal quotation marks, citation, and emphasis omitted). Any such "bedrock" procedures must be "so central to an accurate determination of innocence or guilt ... it is unlikely that any have yet to emerge" since the Court's decision in *Gideon v. Wainwright*,

372 U.S. 335 (1963). *Id.*; *see also Banks II*, 542 U.S. at 417. Whatever its merits, the *Blakely* understanding of "statutory maximum" lacks all of these characteristics.

The same is true for the beyond-a-reasonable-doubt standard upon which Burton focuses. Unlike *Gideon*, *Apprendi* and *Blakely applied in a new context*, but did not *create*, an important rule: the long-standing principle of proof beyond a reasonable doubt. Long before *Apprendi*, the Court had made clear that proof beyond a reasonable doubt on all elements of the offense was a command of the Fifth, Sixth, and Fourteenth Amendments. *See In re Winship*, 397 U.S. 358, 364 (1970) ("The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"); *see also Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993); *United States v. Gaudin*, 515 U.S. 506, 510 (1995). Indeed, *Winship*, which applied the beyond-a-reasonable-doubt standard to juvenile delinquency proceedings, did not create the rule but rather built upon the foundation laid in the early years of the Republic. *Winship*, 397 U.S. at 361-62 (compiling authorities). *See also Apprendi*, 530 U.S. at 478 (summarizing same).

Apprendi further expanded the rule to include facts that had relatively recently become known as "sentencing factors" that were used to enhance a sentence "beyond the statutory maximum." 530 U.S. at 490. *Blakely*, in turn, broadened our understanding of the scope of this rule even further to define "statutory maximum" as including any fact (other than prior convictions) that is necessary to impose a greater sentence. 542 U.S. at 303-04.

These decisions clarify the circumstances where the right to a jury trial and the reasonable-doubt standard apply and represent nothing more than the most recent installment in the

graduated development of this area of constitutional law. Thus, *Apprendi* and *Blakely* are not "groundbreaking," *Caspari*, 510 U.S. at 396, and lack the "primacy and centrality," *Saffle*, 494 U.S. at 495, of rules like *Gideon* that "'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." *Sawyer*, 497 U.S. at 242 (*quoting Teague*, 489 U.S. at 311).

2. With *Gideon* as the standard, "[l]ess sweeping and fundamental rules do not fall" within *Teague*'s watershed rule exception. *Banks II*, 542 U.S. at 418-19 (discussing examples). Truly "watershed" rules "are best illustrated by recalling the classic grounds for the issuance of a writ of habeas corpus—that the proceeding was dominated by mob violence; that the prosecutor knowingly made use of perjured testimony; or that the conviction was based on a confession extorted from the defendant by brutal methods." *Teague*, 489 U.S. at 313 (citations and internal quotation marks omitted). Whatever rules might qualify, they will be among "a small core of rules" that have those central purposes of habeas corpus at their heart. *Id.* While the rules of *Apprendi* and *Blakely* are important, they did not, for example, establish the time-honored principles of a jury trial or the prosecution's burden of proof.

3. Indeed, *Apprendi* and *Blakely* errors are not even structural, but instead may be procedurally defaulted and are subject to plain error review. These characteristics are inconsistent with being so fundamental as to change the entire foundation of criminal due process. It can hardly be contested that, to be deemed "watershed," a rule must first be structural, though not even all errors mandating automatic reversal are applied retroactively. *Tyler*, 533 U.S. at 666-67. Indeed, although the Court has identified several structural errors, see *Recuenco*, 126 S. Ct. at 2551 n.2 (compiling cases), only one—the denial of counsel under *Gideon*—involves a "watershed" rule. "Nor can it be said that all new

rules relating to due process (or even the 'fundamental requirements of due process')" are retroactive. *Tyler*, 533 U.S. at 667 n.7 (citations omitted).

If rules considered to be so fundamental that they require mandatory reversal are not automatically "watershed," then decisions such as *Apprendi* and *Blakely*, which require a showing of prejudice before reversal, are even less appropriate for retroactive application. Simply put, a fair trial is not impossible without *Apprendi* and *Blakely*. *Cf. Gideon*, 372 U.S. at 344-45 ("[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, *cannot be assured a fair trial* unless counsel is provided for him." (emphasis added)). These decisions, therefore, did not articulate a "watershed" rule.

III. Habeas relief is otherwise unavailable to Burton under the AEDPA

Regardless whether *Blakely* is retroactive, the Court should affirm the judgment on the grounds that *Blakely*'s definition of "statutory maximum" was not "clearly established federal law" at the time the Washington state courts adjudicated Burton's *Apprendi* claim. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal court "shall not" grant a writ of habeas corpus unless the state court's adjudication on the merits "resulted in a decision that was contrary to, or involved an unreasonable application of, *clearly established Federal law*, as determined" by the Court. 28 U.S.C. § 2254(d)(1) (emphasis added); *Williams v. Taylor*, 529 U.S. 362, 402-03 (2000). *Blakely* was decided nearly four years after the Washington Court of Appeals adjudicated Burton's claim. *Blakely* plainly was not "clearly established federal law" at that time, so habeas relief cannot be granted under § 2254(d)(1).

1. Burton may argue that § 2254(d)(1) incorporated the *Teague* non-retroactivity analysis such that additional review of whether *Blakely* constituted "clearly established federal law" is unnecessary. *See, e.g., Bockting v. Bayer*, 399 F.3d 1010, 1021 (9th Cir. 2005), *reh'g denied*, 408 F.3d 1127, *cert. granted sub nom. Whorton v. Bockting*, 126 S. Ct. 2017 (2006). Such an interpretation of § 2254(d)(1) would be incorrect.

The Court has recognized that the inquiries under § 2254(d)(1) and *Teague* are "distinct." *Horn v. Banks* (*Banks I*), 536 U.S. 266, 272 (2002) (per curiam). The first distinction is temporal: under § 2254(d)(1), the applicable precedent is that which existed at the time of the state court adjudication, whether on direct *or* state post-conviction review, *Lockyer v. Andrade*, 538 U.S. 63, 71, 72 (2003), while *Teague* focuses on precedent as of the date that the habeas petitioner's conviction became final on direct review, *Banks II*, 542 U.S. at 413. "In this respect, the 'clearly established Federal law' phrase bears only a slight connection to [the Court's] *Teague* jurisprudence." *Williams*, 529 U.S. at 412. Second, § 2254(d)(1) limits the source of the applicable law to the Court's precedent and not that of other courts; *Teague* has no such requirement. *Id.* Third, *Teague* provides two exceptions to its non-retroactivity principle while § 2254(d)(1) does not. The statute precludes habeas relief if the law was not "clearly established," with no exceptions for the importance of the new law. *Id.*

Accordingly, § 2254(d)(1) precludes the application of any "new rule," regardless whether it is retroactive under *Teague*. If Congress had intended for federal courts to consider under § 2254(d)(1) new rules subject to retroactive application, it would have structured that section much as it did the successive petitions and statute of limitations provisions of 28 U.S.C. § 2244(b)(2)(A) and (d)(1)(C), and

the evidentiary hearing provision of § 2254(e)(2)(A), using phrases like "new rule of constitutional law" and "made retroactive to cases on collateral review." *See also* 28 U.S.C. § 2264(a)(2) (allowing habeas review in qualifying capital cases where "Supreme Court's recognition of a new Federal right that is made retroactively applicable"). *Cf. Duncan v. Walker*, 533 U.S. 167, 172 (2001) (a comparison of 28 U.S.C. § 2244(d)(2) to other AEDPA provisions supplies "strong evidence" that Congress intended to exclude federal collateral review from the tolling provision of the statute of limitations).

2. In Burton's case, the rule announced in *Blakely* was not "clearly established" at the time that the Washington Court of Appeals adjudicated his claim in 2001. Clearly established law "refers to the holdings, as opposed to the dicta, of this Court's decisions." *Williams*, 529 U.S. at 412; *see also Kane v. Garcia Espitia*, 126 S. Ct. 407, 408 (2005) (rules inferred from the Court's precedents cannot form a basis for habeas relief). As Justices Breyer and O'Connor outlined in their *Blakely* dissents, *Apprendi* did not require the Court to have announced the rule it did. *Blakely*, 542 U.S. at 346 (Breyer, J., dissenting) ("Until now, I would have thought the Court might have limited *Apprendi* so that its underlying principle would not undo sentencing reform efforts."); *id.* at 320 n.1 (O'Connor, J., dissenting) ("there is no map of the uncharted territory blazed by today's holding"). No circuit believed that *Apprendi* clearly applied to facts used to determine a sentence within the maximum range allowed by statute, and only one state court of last resort had read *Apprendi* in that fashion. Given the wide disagreement among members of this Court and jurists across the country about the scope of the *Apprendi* rule, it did not "clearly establish" the rule later announced in *Blakely* and habeas relief cannot now be based on it.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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